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The Federal Tort Claims Act: A Sword or Shield for Recovery from the Government for Negligent Hazardous Waste Disposal?

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THE FEDERAL TORT CLAIMS ACT: A SWORD OR SHIELD FOR RECOVERY FROM THE GOVERNMENT FOR NEGLIGENT HAZARDOUS WASTE DISPOSAL?

The dangers of hazardous waste to both the community and the environment require regulation of toxic waste disposal.[1] Awareness of waste management problems has spawned broad legislation in recent years.[2] The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) represents one legislative enactment.[3] CERCLA identifies property owners as the primary targets for liability for the effects of hazardous waste and its cleanup.[4] The strict liability standard implicit in CERCLA forces an owner to pay for cleanup costs even in cases where the waste was improperly disposed of without an actual violation by the owner.[5] Due to the extensive costs of safe

1. *See* Rich, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 B.C. ENVTL. AFF. L. REV. 643, 645-46 (1986) (discussing CERCLA generally and focusing on individual liability based upon involvement in generation and disposal of hazardous waste).

2. *Id.* at 643. The two major acts addressing hazardous waste problems are the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6987 (1982), and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9657 (1982).

3. 42 U.S.C. §§ 9601-9657 (1982).

4. *See infra* notes 17, 27-28 and accompanying text for a discussion of parties liable under CERCLA.

5. For instance, an owner is liable for hazardous waste on the property although the contamination occurred prior to his ownership of the property. *See infra* notes 24-26 and accompanying text for background on the strict liability standard in CERCLA.

cleanup and storage of hazardous waste,[6] owners often look to other responsible parties for contribution or reimbursement.[7] A private party's use of tort law as a means toward obtaining damage recovery or compelling waste cleanup proves particularly difficult when a federal agency is responsible for the improper disposal.[8]

This Note analyzes the use of a private action under the Federal Tort Claims Act (FTCA) to recover damages for negligent disposal of hazardous waste. First, Part I describes the legislation concerning the disposal and cleanup of hazardous waste, primarily focusing on CERCLA's scope and liability.[9] Then, Part II analyzes FTCA claims and exceptions with respect to tortious acts concerning hazardous waste disposal.[10] Finally, Part III critiques a recent successful FTCA claim involving improper waste disposal.[11]

I. LIABILITY UNDER CERCLA

Recent hazardous waste legislation represents Congress' attempt to develop a comprehensive plan addressing toxic waste management. The Resource Conservation and Recovery Act (RCRA)[12] focuses on regulation of storage and disposal of hazardous waste.[13] RCRA, how-

6. For example, an EPA study in 1979 estimated cleanup costs between $13.1 and $22.1 billion for under 2,000 sites posing a serious threat to the public. H.R. REP. NO. 96-1016, 96th Cong., 2d Sess. 17, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6125.

7. This Note addresses use of an FTCA action to recover damages caused by waste disposal. CERCLA, however, authorizes private parties to recover response costs from responsible parties under § 107. *See infra* notes 27-30 and accompanying text for a discussion of private response action under CERCLA.

8. In Dickerson, Inc. v. United States, 875 F.2d 1577 (11th Cir. 1989), however, the Eleventh Circuit held the federal government liable to a private party for damages caused by improper waste disposal. Notably, though, an independent contractor hired by a Defense Department agency handled the actual transport and disposal. *See infra* notes 89-160 and accompanying text for a discussion of the *Dickerson* decision.

9. *See infra* notes 13-30 and accompanying text.

10. *See infra* notes 31-98 and accompanying text.

11. *See infra* notes 99-162 and accompanying text.

12. 42 U.S.C. §§ 6901-6987 (1982).

13. In RCRA, Congress limits the focus to regulation of transportation, storage and disposal of hazardous waste. *Id.* § 6924. The Act applies prospectively and does not specifically address the problems caused by existing and abandoned waste sites. RCRA § 6902(b) states the national policy behind RCRA:

> The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated,

ever, does not address the problem of abandoned hazardous waste sites.[14] Consequently, Congress filled this regulatory gap by enacting CERCLA.[15]

CERCLA covers cleanup of existing solid waste sites which pose a dangerous or potentially dangerous risk to the community and the environment.[16] CERCLA provides a list of "responsible parties" liable for cleanup costs.[17] Responsible parties include generators and transporters of hazardous waste as well as past and present site owners.[18] The responsibilities and liabilities imposed by CERCLA explicitly apply to government agencies, private individuals, and private organizations.[19]

The Environmental Protection Agency (EPA) utilizes CERCLA provisions to protect the environment from hazardous waste expo-

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stored or disposed of so as to minimize the present and future threat to human health and the environment.

42 U.S.C. § 6902(b) (Supp. 1987).

14. H.R. REP. NO. 1016, 96th Cong. 2d Sess. 22, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119-6128. *See* Rich, *supra* note 1, at 646-649 (discussing RCRA's provisions and deficiencies).

15. *Id.*

16. 42 U.S.C. §§ 9604-6 (1982). Examination of CERCLA's legislative history reveals its goal to establish "a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste sites." H.R. REP. NO. 1016, 96th Cong., 2d Sess. 22, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6125. *See infra* notes 21-23 and accompanying text for discussion of financing for cleanup under CERCLA.

17. CERCLA Section 107 lists the responsible parties:

(1) the owner and operator of a . . . facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . .

42 U.S.C. § 9607(a) (1982).

18. *Id.*

19. CERCLA § 107(g) states, "[e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section." 42 U.S.C. § 9607(g) (1982).

sure.[20] CERCLA authorizes the EPA to clean up existing dangerous waste sites[21] using federal funds.[22] The EPA may obtain the federal funds to finance the cleanup and then seek recovery from any of the "responsible parties."[23] Ordinarily, courts hold property owners whose land contains hazardous waste[24] strictly liable[25] for the response costs incurred in the cleanup of the waste.[26]

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20. *See* Rich, *supra* note 1, at 650-53.

21. 42 U.S.C. § 9604(a) (1) (1982). This section authorizes the President to remove waste which poses an imminent and substantial danger to the public health or welfare. *Id.* Congress delegated this authority to the EPA, among other agencies. *See* Rich, *supra* note 1, at 650 n.66. CERCLA also permits the EPA to seek an injunction to prevent an imminent release of hazardous substances. 42 U.S.C. § 9606 (1982). *See* United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982) (CERCLA § 9606 authorizes the EPA to seek emergency injunctive relief).

22. 42 U.S.C. § 9611 (1982). "Superfund" is the common name for the Hazardous Response Trust Fund. *Id.* The fund consists primarily of revenue generated by taxing oil and chemical producers. *See* 42 U.S.C. § 9631 (1982). Superfund allows the EPA to finance cleanup quickly to prevent further harm to the environment. *See* Rich, *supra* note 1, at 650 n.63.

23. Section 107 describes the responsible parties and the extent of liability. 42 U.S.C. § 9607(a) (1982). Section 107 also authorizes private action against responsible persons for response costs incurred in certain instances. 42 U.S.C. § 9607(a) (4) (B) (1982). *See infra* notes 27-30 and accompanying text. Liability for response costs can be joint and several. *See* Rich, *supra* note 1, at 656. Therefore, either the EPA or a private party can sue a responsible party for the full amount of the response costs. 42 U.S.C. § 9607(a) (1982).

24. CERCLA lists three defenses to liability of a responsible party. 42 U.S.C. § 9607(b) (1)-(4) (1982). These include: (1) an act of God; (2) an act of war; and (3) a third party defense if the act or omission was caused solely by a third party acting without authority and outside of a contractual relationship with the responsible party. 42 U.S.C. 9607(b) (1982). Courts have also interpreted the third party defense to place an affirmative duty of due care on the responsible party. *See generally* Note, *The Practical Significance of the Third Party Defense Under CERCLA*, 16 B.C. ENVTL. AFF. L. REV. 383 (1988).

25. CERCLA states that the standard of liability shall be the same as under the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321 (1982). *See* 42 U.S.C. § 9601(32) (1982). Although strict liability is not mentioned specifically in the FWPCA, courts could interpret the statute to provide a strict liability standard. *See* City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982) (city sued generators for cleanup costs of waste illegally dumped in city landfill). *See also* Note, *supra* note 24, at 385 n.17.

26. Response costs refers to the costs incurred in the site cleanup. These include:
(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
(C) damages for injury to, destruction of, or loss of natural resources, including

CERCLA includes a private party's cleanup costs in its catalog of responsible parties' potential liability.[27] Courts have used this reference to private response costs to recognize the opportunity for private CERCLA action.[28] A private party may sue responsible parties for reimbursement of cleanup costs expended pursuant to the national contingency plan.[29] Potential CERCLA liability of a plaintiff as a responsible party does not bar a private response cost action.[30]

II. FTCA CLAIM

The exorbitant cleanup costs of a hazardous waste site can make CERCLA liability a crippling expense for a property owner.[31] As the property owner is most readily identified as a responsible party, he is often subject to the full amount of an EPA claim for response costs.[32] Although CERCLA places responsibility and liability on each actor in the "chain-of-hands" carrying waste,[33] the site owner must overcome a

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the reasonable costs of assessing such injury, destruction or loss resulting from such a release.

42 U.S.C. §§ 9607(a) (4) (A)-(C) (1982).

27. CERCLA § 107(a) (4) (B) provides that responsible parties "shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . ." 42 U.S.C. § 9607(a) (4) (B) (1982).

28. *See, e.g.*, United States v. Conservation Chemical Co., 619 F. Supp. 162, 223 (W.D. Mo. 1985) (general concepts of joint and several liability used to support private cause of action); State v. Shore Realty, 648 F. Supp. 255, 260 (E.D.N.Y. 1986) (owner of hazardous waste site sued 95 responsible parties for contribution to response costs); State v. Asarco, Inc., 608 F. Supp. 1484, 1485 (D. Colo. 1985) (private action by mining company against owners of surrounding property with access to lateral tunnel for contribution). The national contingency plan (NCP) also recognizes that CERCLA § 107 creates a private cause of action. 40 C.F.R. § 300.71(a) (1) (1989).

29. 42 U.S.C. § 9607(a) (4) (B) (1982). The NCP outlines the procedure for waste removal, including analysis of remedial alternatives, choosing a cost effective response, and allowing for public involvement in the choice or remedy. 40 C.F.R. § 300.71(a) (2) (ii) (A)-(D) (1989). A private party is not required to get prior government approval before undertaking a cleanup project. *Shore Realty*, 648 F. Supp. at 264. The plaintiff must prove consistency with the NCP at trial. *Id.*

30. Chemical Waste Management v. Armstrong World Industries, Inc., 669 F. Supp. 1285 (E.D. Pa. 1987) (owner of contaminated landfill sued generators for response costs).

31. *See supra* note 6 and accompanying text for an example of estimated cleanup costs.

32. *See, e.g., Shore Realty*, 648 F. Supp. 255, 258 (owner of hazardous waste site sued 95 responsible parties for contribution to response costs).

33. *See supra* notes 17-30 and accompanying text for discussion of responsible parties under CERCLA.

difficult obstacle to obtain recovery when the federal government is a responsible party.

Congress enacted the Federal Tort Claims Act[34] to allow private actions against the federal government for torts caused by government employees.[35] The basic rule prevents private actions against the United States unless the legislature made the government amenable to suit.[36] If a private person would be liable under the laws of the state where the act or omission occurred, the FTCA waives sovereign immunity.[37] However, two exceptions to the immunity waiver frequently arise. First, the discretionary function exception protects the government from tort liability for damages allegedly arising from a government agency or employee's discretionary function or duty.[38] Second, the negligence of an independent contractor will not trigger the sovereign immunity waiver,[39] as independent contractors are not government employees under the FTCA.[40]

A. *Discretionary Function Exception*

Congress intended the discretionary function exception[41] to protect

34. 28 U.S.C. § 1346 (1982).

35. 28 U.S.C. § 1346(b) (1982). Congress enacted the FTCA with redress for "garden variety torts" in mind. Dalehite v. United States, 346 U.S. 15, 28 (1953). Although the FTCA limits sovereign immunity, the Act is not intended to interfere with government decision-making. During hearings on the immunity waiver, proponents cited the negligent operation of motor vehicles as a common example of a type of claim covered under FTCA. H.R. REP. No. 2428, 76th Cong., 1st Sess., at 5 (1939), *noted in Dalehite*, 346 U.S. at 28-29 nn. 19-21.

36. *Dalehite*, 346 U.S. at 30. The legislature must authorize an action against the United States government in order to pierce the sovereign immunity. *Id.*

37. 28 U.S.C. § 1346 (b) (1982). Notably, the FTCA requires private plaintiffs to state claims for which a private actor would be liable under applicable state law. *Id.* Even if the claim successfully avoids the defenses to the immunity waiver the court must scrutinize the underlying tort claim.

38. 28 U.S.C. § 2680(a) (1982). There is no liability for "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.*

39. 42 U.S.C. § 2671 (1982). The statute exempts any "discretionary function or duty on the part of a federal agency or an employee of the Government. . . ." 42 U.S.C. § 2680(a) (1982).

40. 28 U.S.C. § 2671 (1982). The FTCA specifically excludes independent contractors from the definition of federal agency. *Id. See* Logue v. United States, 412 U.S. 521, 526-27 (1973).

41. *See supra* note 38 for text of the discretionary function exception.

policy-making and government decisions from tort liability.[42] However, determining the type of decision or decision-maker falling under the exception makes the exception clearer in theory than in application.

The Supreme Court first addressed the scope and application of the discretionary function exception in *Dalehite v. United States*.[43] In *Dalehite*, a shipment of fertilizer manufactured by the government exploded, injuring many people and killing several others.[44] The plaintiff alleged that the explosion resulted from the government's negligence by adopting a fertilizer export program, and by controlling various phases of the manufacture, production, and distribution of the product.[45] Additionally, the plaintiff alleged the government's negligence in failing to notify persons handling the product of its dangerous nature.[46] The district court agreed, holding the government liable for damages.[47] The Court of Appeals for the Fifth Circuit reversed the district court decision.[48] The Supreme Court granted certiorari to interpret the FTCA language, and held that the FTCA discretionary function exception shielded the government from liability.[49]

In making its determination, the Supreme Court articulated a broad test based on the nature of the employee's act, extending the discretionary function exception to government decisions beyond the initiation of programs and policies.[50] Accordingly, regardless of the rank of the employee, an employee decision allowing room for judgment and policy considerations falls within the exception.[51] The Court also extended the bar on liability to cover non-discretionary actions taken by a subordinate executing a discretionary decision made at the planning

42. Congress included the discretionary function exception in the FTCA to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of a tort suit." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984) (commercial aircraft owner brought FTCA action to recover cost of destroyed aircraft).

43. 346 U.S. 15 (1953).

44. *Id.* at 17.

45. *Id.* at 23, 24.

46. *Id.*

47. *Id.* at 24.

48. 197 F.2d 771 (5th Cir. 1952).

49. *Id.*

50. *Id.* at 35-36.

51. *Id.* at 36.

level.[52]

Dalehite's broad language led to inconsistent interpretations of the scope of the discretionary function exception.[53] Inconsistent interpretations concerning the importance of planning versus operational labelling of an action undercut the strength of *Dalehite* as the controlling authority on the discretionary function exception.[54] One important aspect of the exception provides that abuse of discretion does not preclude government immunity from tort liability.[55] The *Dalehite* court focused not on whether the agency actually exercised discretion and judgment, but instead on the susceptibility of an action to policy considerations.[56] Courts have consistently held that the absence of actual consideration of policy factors does not remove the decision or action

52. *Id.* at 35-36. The *Dalehite* court left unclear the relevance of the distinction between the planning and operational stages of a government action. Although *Dalehite* applied the same discretionary test to employees regardless of status, the court distinguished between decisions made at the planning level and those at the operational level. *Id.* at 33, 42. The court stated that the government was not liable based upon the actions in the claim, concluding that all of the alleged negligent acts were made at the planning level. *Id.* at 42. The court undermined its proclaimed analysis of the actions based upon the nature of the act by adding planning/operational labels.

53. *See* Fishback and Killefer, *The Discretionary Function Exception to the Federal Torts Claims Act, Dalehite to Varig to Berkowitz*, 25 IDAHO L. REV. 291, 295-96 (1988). The language of *Dalehite* allowed application of the discretionary function exception to almost all actions of government agencies or employees. *Id.* at 296. *Dalehite* interpreted the discretionary function exception to include any decision "where there is room for policy [and] judgement. . . ." 346 U.S. at 36. Lower courts inconsistently interpreted the limits of this phrase. Fishback and Killefer, *supra,* at 296. For instance, in cases of extreme or numerous injuries, many courts interpreted *Dalehite* as narrowly as possible in order to allow recovery. *Id.*

54. Fishback and Killefer, *supra* note 53, at 296-97. The Supreme Court addressed the planning/operational distinction in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). Although subsequently distinguished because the case was not based directly on the discretionary function exception, courts frequently discuss *Indian Towing* for its post-*Dalehite* treatment of the planning/operational distinction. Fishback and Killefer, *supra* note 53, at 296-97. In *Indian Towing*, the Court found that the initial decision to operate the lighthouse was an exercise of discretion. *Indian Towing*, 350 U.S. at 69. However, once the government decided to operate the lighthouse, the negligent operation subjected the government to liability under the FTCA. *Id.*

55. 28 U.S.C. § 2680(a) (1982) provides that the FTCA is inapplicable to "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused." *Id.*

56. 346 U.S. at 33-34. Committee reports stated that the discretionary function exception precludes an action for "abuse of discretionary authority — whether or not negligence is alleged to have been involved." 88 CONG. REC. 313-14 (1942), *quoted in* 346 U.S. at 33.

from the sphere of discretion.[57]

Although cases after *Dalehite* appeared to narrow the discretionary function exception, the Supreme Court in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*[58] strongly supported the *Dalehite* analysis.[59] In *Varig Airlines* an airline and the families of victims of an airplane crash sued the government to recover damages for the destroyed aircraft and wrongful death, respectively.[60] The Court stressed that the discretionary function exception is not limited to government regulatory action.[61] Additionally, the Court reiterated that the discretionary function exception may apply to any level of government employee.[62] Thus, the nature of the agency or employee's decision dictates application of the exception.[63]

Varig Airlines clearly extended the discretionary function exception to government agency or employee decisions beyond initial planning at the executive level.[64] Non-discretionary acts in execution of discretionary decisions made at the planning level are immune from tort liabil-

57. "[I]t is irrelevant whether the government employee actually balanced economic, social, and political concerns in reaching his or her decision." United States Fidelity and Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988) (decision by On Scene Coordinator responsible for determining the nature and scheduling of cleanup procedures protected), *cert. denied*, 487 U.S. 1235 (1988). *See also* Myslakowski v. United States, 806 F.2d 94 (6th Cir. 1986) (officials involved in second-hand sale of postal jeeps who failed to address safety concerns fell within the discretionary function exception), *cert. denied*, 480 U.S. 948 (1987); Allen v. United States, 816 F.2d 1417, 1422 n.5 (10th Cir. 1987) (court ruled that "it is irrelevant whether an alleged failure to warn was a matter of 'deliberate choice' or a mere oversight"), *cert. denied* 484 U.S. 1004 (1988); Fishback and Killefer, *supra* note 53, at 299 (The absence of a conscious decision "to do or not do something will not preclude an action from the discretionary function exception.")

58. 467 U.S. 797 (1984). The court found both the Federal Aviation Administration's development of a spot-check plan and the execution of the plan by subordinates to be immune from liability under the FTCA. *Id.* at 820.

59. "While the Court's reading of the Act admittedly has not followed a straight line, we do not accept the supposition that *Dalehite* no longer represents a valid interpretation of the discretionary function exception." *Id.* at 811-12.

60. *Id.* at 800.

61. *Id.* at 810. The FTCA applies to regulatory agencies, but only discretionary decisions by the agencies are protected. In Berkovitz v. United States, 486 U.S. 531 (1988), the court emphasized that the analysis is the same whether the government action is characterized as regulatory or proprietary. *Id.* at 538-39.

62. *Varig Airlines*, *supra* note 42, at 813.

63. *Id.*

64. *Id.*

ity.[65] Moreover, agency or employee decisions made at the operational level may involve policy considerations and thus may be discretionary.[66]

The most recent articulation of the Supreme Court's discretionary function test appeared in *Berkovitz v. United States*.[67] In *Berkovitz*, the Court reformulated the *Dalehite*[68] and *Varig Airlines*[69] analysis into a two-pronged test.[70] The first prong analyzes the extent to which the action is a matter of choice for the employee.[71] Regardless of the employee's job status, any decision involving consideration of policy and requiring judgment satisfies the test's first prong.[72]

The *Berkovitz* Court isolated a strong exception to the protection afforded by the discretionary function label. Failure to follow a course of action explicitly mandated by federal statute, regulation or policy does not constitute a discretionary act.[73] When a violation of a specific mandate occurs, the employee has failed to adhere to a procedure which allowed no room for choice or policy consideration.[74] The absence of any permissible policy consideration forecloses the use of the

65. Dalehite v. United States, 346 U.S. 15, 35-36 (1953).

66. *Varig Airlines, supra* note 42, at 813.

67. 486 U.S. 531 (1988). In *Berkovitz*, a user of polio vaccine brought an action against the government for negligent approval and distribution of the vaccine. *Id.* at 533. The government based its defense on the discretionary function exception. *Id.* at 533-34. The Court's analysis of the discretionary function exception is applicable to any FTCA action, including decisions regarding the disposal of hazardous waste.

68. 346 U.S. 15 (1953). *See supra* notes 43-57 and accompanying text for discussion of *Dalehite*.

69. 467 U.S. 797 (1984). *See supra* notes 58-68 and accompanying text for discussion of *Varig Airlines*.

70. *Berkovitz*, 486 U.S. at 536-37.

71. *Id.* at 536.

72. *Id.*

73. *Id.* This test is referred to as the "mandatory requirement" test. In *Berkovitz* the plaintiff successfully established that the federal agency failed to comply with safety regulations specifically requiring the agency to require submission of and to review reports from the manufacturer of the vaccine. *Id.* at 541-43.

74. In *Berkovitz* the Court discussed the process for licensing the polio vaccine. *Id.* at 541-44. Statutory and regulatory provisions require that the Division of Biological Standards examine the product and determine compliance with the regulations. *Id.* A failure to examine the vaccine or to require relevant data to be delivered to the Food and Drug Administration violates a specific statutory mandate. *Id.* at 542. An agency has discretion in its analysis of the data, but compiling data from the manufacturer is absolutely required. *Id.* at 545-46.

discretionary function exception to bar action under the FTCA.[75] If, however, the procedure or regulation allows the employee to decide how to carry out the directive, then the discretionary function exception will apply.[76] Accordingly, if a private plaintiff in an FTCA action proves that the government failed to follow a specific and mandatory requirement not involving any element of choice, then he will satisfy the first prong of the *Berkovitz* test.

The second prong of the *Berkovitz* test questions whether the government's decision represents the type of action which Congress intended to shield from tort liability.[77] The exception should cover decisions involving the permissible exercise of public policy considerations.[78] Congress did not intend for private plaintiffs to use the FTCA as a vehicle to attack legislative policy decisions through tort actions.[79]

B. *Independent Contractor Exception*

The FTCA permits private action against the federal government for

75. If the mandatory requirement allowed no room for choice in application or execution, there is no discretionary act for the exception to protect. *Id.* at 536-37. Interestingly, the *Berkovitz* Court mentioned Indian Towing Co. v. United States, 350 U.S. 61 (1955), in a footnote supporting its discretionary function analysis. 486 U.S. at 538 n.3. Ordinarily, courts cite *Indian Towing* in reference to the planning/operational distinction. *Id.* In *Indian Towing* the government agency violated specific mandatory regulations in its operation of a lighthouse. This distinction is consistent with the *Berkovitz* analysis if the focus is shifted to the mandatory nature of the regulations violated rather than the fact that the violation occurred at the operational level. *See* Pooler v. United States, 787 F.2d 868 (3d Cir. 1986) (no discretionary action exists if the conduct violates the Constitution, a statute or an applicable regulation), *cert. denied*, 479 U.S. 849 (1986) (citing Dalehite v. United States, 346 U.S. 15 (1953)). *See also* Fishback and Killefer, *supra* note 53, at 302-03.

76. For example, in cleanup operations, both CERCLA and EPA directives give the On Scene Coordinator broad discretion to determine the best way to carry out the statute's goals. Decisions within the responsibility to execute the cleanup are protected. *See* U.S. Fidelity and Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988) (discretionary function exception protects decision by On Scene Coordinator responsible for determining the timing of an element of a cleanup procedure). *See also Pooler*, 787 F.2d at 871 (discretionary function exception applied when officer in charge of investigation had choices as to how to carry out investigation).

77. 486 U.S. at 537. Although this prong begs the question, it allows courts to consider the specific facts of a given situation in light of the policy behind the discretionary function exception.

78. *Id.* at 537. *See supra* notes 41-42 and accompanying text for discussion of the policy for including the exception to the general immunity waiver.

79. *See Varig Airlines*, *supra* note 42, at 814.

actions of its agencies and employees.[80] The FTCA specifically excludes independent contractors from its definition of federal agency.[81] In *Laird v. Nelms*,[82] the Supreme Court held that the FTCA language precludes a finding of any form of absolute governmental liability resulting from certain types of activity, including "ultrahazardous" activity.[83] Nevertheless, the Court noted that common law provides several exceptions to the general rule precluding employer liability for the negligent acts of an independent contractor.[84]

In *Gibson v. United States*,[85] the Third Circuit discussed the common law exceptions to potential liabilities of a government employer. The court summarily dismissed the possibility of attaching vicarious liability upon the government under the theory of respondeat superior.[86] Even though a government agency retains broad supervisory control over the actions of an independent contractor, that control is not enough to characterize the contractor as an agent of the government and impute liability to the United States.[87]

The *Gibson* court also examined a theory holding an employer liable for a contractor's negligence when the contractor performs an "inherently dangerous activity."[88] Whether a party bases this liability upon a

80. 28 U.S.C. § 1346(b) (1982).

81. 28 U.S.C. § 2671 (1982). The Supreme Court drew the distinction between an independent contractor and an agent of the United States government. Gibson v. United States, 567 F.2d 1237, 1242 (3d Cir. 1977) (quoting United States v. Orleans, 425 U.S. 807, 815 (1976)).

82. 406 U.S. 797 (1972).

83. *Id.* at 802-03.

84. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 468 (4th ed. 1971).

85. 567 F.2d 1237 (3d Cir. 1977) (plaintiff brought FTCA claim for damage caused by alleged assault by enrolling at federal job corps center), *cert. denied*, 436 U.S. 925 (1978). *Gibson* relied on United States v. Orleans, 425 U.S. 807 (1972) for its analysis. *Gibson* presented an analysis in a logical format for application to cases analogous to the problems caused by hazardous waste disposal.

86. *Id.* at 1242. The court refused to impose liability on the government based on the agency's failure to supervise the independent contractor. *Id.*

87. *Id.* The court also indicated that no liability is created even when the government retains the right to exert detailed control over operations. *Id.* Courts consistently refuse to hold the United States vicariously liable for injuries to employees based solely upon the supervisory control of the government. *See, e.g.*, Fisher v. United States, 441 F.2d 1288 (3d Cir. 1971) (denying FTCA claim by sub-contractor employee injured while working on flood control dam).

88. In *Gibson*, the court interpreted this theory as based on RESTATEMENT (SECOND) OF TORTS §§ 416, 427 (1965). *Gibson*, 567 F.2d at 1243. These sections isolate activities which the employer should identify as presenting "peculiar risk to others."

theory of respondeat superior[89] or a "non-delegable duty"[90] it nonetheless remains a form of vicarious or absolute liability.[91] The Supreme Court has held, however, that the government cannot be liable under the FTCA for damages which do not result from the negligence of a government agency or employee.[92]

Nonetheless, courts may impose liability on the government for a government employee's independent negligent acts relating to an independent contractor.[93] Common law, moreover, may impose a duty on the employer, independent of vicarious responsibility, to take reasonable precautions to protect third parties from foreseeable risks of harm.[94] As the court in *Gibson* discusses, even if this duty exists, its application to a government entity raises other questions.[95] For example, the execution of the duty to protect may raise discretionary action

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(quoting RESTATEMENT (SECOND) OF TORTS § 416 (1965)). The employer is liable for resulting harm regardless of the purported delegation by contract, or otherwise, of the responsibility to take reasonable precautions. *Id.*

89. The FTCA does not make the government liable for actions of an independent contractor. 28 U.S.C. § 2671 (1982). Any liability theory which imputes negligence of an independent contractor to the government based on respondeat superior falls outside the limits of the FTCA waiver of sovereign immunity. *See Gibson*, 567 F.2d at 1242.

90. A "non-delegable" duty is a duty which the courts have determined is of such importance to the community that an employer is not allowed to transfer it. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 471 (4th ed. 1971).

91. *Gibson*, 567 F.2d at 1244. Liability of the employer based upon the ultrahazardous character of the activity is grounded in strict liability. Laird v. Nelms, 406 U.S. 797, 800 (1972). An ultrahazardous activity is an activity which remains dangerous regardless of precautions taken. *Id.*

92. *Gibson*, 567 F.2d at 1244. "Regardless of state law characterization, the Federal Tort Claims Act itself precludes the imposition of liability if there has been no negligence or other form of 'misfeasance' or 'nonfeasance. . . .'" *Laird*, 406 U.S. at 799 (quoting Dalehite v. United States, 364 U.S. 15 (1953)). *Laird*, a 1972 Supreme Court case, is frequently cited for the proposition that the government cannot be held liable under a theory of absolute liability.

93. *See* Logue v. United States, 412 U.S. 521, 532-33 (1973) (remanding case to determine possible negligence of federal employee in connection with independent contractor); Aretz v. United States, 604 F.2d 417, 428, 431 (5th Cir. 1979) (holding government negligent for failure to inform contractor of change in hazardous classification of chemical used).

94. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 469 (4th ed. 1971).

95. *Gibson*, 567 F.2d at 1245. The court addressed this argument although it was not directly raised in the district court. *Id.* at 1244. Although the court indicated that allegations of direct negligence could prove difficult, the court did not reach any conclusion about possible defenses or specific instances where negligence would be found. *Id.* at 1245.

defenses to a tort action.[96] Additionally, barring delegation of the duty to the independent contractor appears to make the government absolutely liable for insufficient precautions.[97]

III. *DICKERSON, INC. V. UNITED STATES*

In *Dickerson, Inc. v. United States*,[98] the court held the federal government liable under the FTCA.[99] The plaintiff's claim involved damages caused by improper disposal of hazardous waste.[100] The *Dickerson* court rested its decision on Florida tort law,[101] and refused to apply either the discretionary function exception or the independent contractor exception to bar liability.[102]

The Defense Property Disposal Service (DPDS), an agency of the Department of Defense,[103] contracted with several independent companies for transportation and disposal of contaminated waste oil from military installations.[104] American Electric Corporation (AEC) contracted with DPDS to dispose of the waste.[105] Dickerson, Inc., an asphalt and paving company, purchased waste oil containing PCBs[106]

96. *See supra* notes 41-79 and accompanying text for discussion of the discretionary function exception.

97. *See supra* notes 80-84 and accompanying text.

98. 875 F.2d 1577 (11th Cir. 1989).

99. *Id.* at 1584.

100. *Id.*

101. The FTCA waives sovereign immunity for certain tort claims by private parties. The primary restriction requires that the claim involve an action which applicable state tort law would find a private party liable. 28 U.S.C. § 1346(b) (1983). Therefore, the *Dickerson* court used Florida tort law to hold the government liable. 875 F.2d at 1583.

102. 875 F.2d at 1584.

103. *Id.* at 1579. This agency relationship established the United States as a responsible party. The DPDS assumed responsibility for disposal of PCB waste from military installations around the country. The delegation to DPDS was pursuant to Defense Environmental Quality Program and Policy Memoranda 80-5 and 80-9. Dickerson, Inc. v. Holloway, 685 F. Supp. 1555 (M.D. Fla. 1987).

104. *Dickerson*, 875 F.2d at 1579. The waste oil was contaminated with PCBs, highly toxic chemicals used in electrical transformers. *Id.* Studies show that PCB contamination can cause cancer, decreased fertility, still births, and birth defects in test animals. *Id.* at 1583.

105. *Id.* at 1579. AEC received two contracts from DPDS. *Id.* A different DPDS employee administered each, but neither had experience with hazardous waste disposal. *Id.*

106. *Id.* Dickerson used waste oil to heat the asphalt. *Id.* Holloway Waste Oil Company served as its main supplier. *Id.*

at levels far exceeding EPA limits.[107] The seller, Holloway Waste Oil Company, purchased the waste oil from AEC.[108] Dickerson sued the United States for negligently selecting AEC to dispose of the waste.[109]

Dickerson alleged that DPDS failed to supervise the waste disposal by AEC to ensure proper disposal of the PCB contaminated waste oil.[110] The district court held that the discretionary function exception protected the DPDS decision awarding the contracts to AEC.[111] The exception, however, did not protect subsequent supervision of the execution of the contract.[112] Therefore, the district court found the government liable under a Florida tort law theory of a nondelegable duty to third parties.[113] The duty applies to employers who hire an independent contractor to perform inherently dangerous activities.[114] In *Dickerson, Inc. v. United States*, the Court of Appeals for the Eleventh Circuit affirmed.[115]

A. *Discretionary Function Exception*

The Eleventh Circuit first addressed the discretionary function exception in *Dickerson*. Although the decision did not explicitly adopt the *Berkovitz* test,[116] the court's analysis appears to be the same.[117] The court followed the *Berkovitz* rationale by refusing to apply the discretionary function exception to agency violations of federal statutes,

107. *Id.* at 1579-80. The EPA delineates three categories of PCB contamination; each requires segregated storage and disposal of the waste. Oil containing over 500 parts of FPCB per million comprises the category of greatest toxicity. All oil tanks at the Dickerson site contained waste oil in this category. *Id.*

108. *Id.* at 1579.

109. *Id.* at 1580. The EPA stayed the CERCLA proceedings forcing Dickerson, as owner, to clean up the waste, pending outcome of the suit against the government. Dickerson, Inc. v. Holloway, 685 F. Supp. 1555, 1563 (M.D. Fla. 1987). Dickerson was unable to finance the $800,000 estimated cost of cleanup. *Id.*

110. *Dickerson*, 875 F.2d at 1580.

111. *Dickerson*, 685 F. Supp. at 1565.

112. *Id.* at 1565-66.

113. *Id.* at 1566. Although the district court also described affirmative duties created by EPA regulations, the appellate court affirmed the finding of negligence based solely on Florida tort law. *Dickerson*, 875 F.2d at 1584.

114. *Dickerson*, 685 F. Supp. at 1566.

115. *Dickerson*, 875 F.2d at 1584.

116. *See supra* notes 67-79 and accompanying text for a discussion of *Berkovitz*.

117. The court repeatedly cites *Berkovitz* to support its conclusions. The court primarily uses the *Berkovitz* "mandatory regulation" analysis to support its decision not to apply the exception. *Dickerson*, 875 F.2d at 1580-81.

regulations and policies.[118]

The *Dickerson* court outlined three reasons to support its decision that the DPDS actions surrounding the waste oil disposal were not discretionary acts. First, the court discussed general CERCLA liability and the responsibility of anyone who arranges for transfer of hazardous waste.[119] The court then stressed the ongoing safety obligation of a responsible party under CERCLA and the unique concerns involving hazardous waste.[120] Although the DPDS qualified as a responsible party under CERCLA,[121] the court did not identify specific instances of CERCLA violations as required by the *Berkovitz* analysis.[122] Rather, the Eleventh Circuit stated that the statute's import and the ramifications of CERCLA violations alone failed to remove a decision from the scope of the discretionary function exception.

The existence of EPA regulations requiring the use of a manifest tracking system formed the second basis for the *Dickerson* court's decision.[123] The regulations describe a specific procedure to which DPDS must adhere in order to comply with an ongoing responsibility in toxic waste disposal.[124] As in its treatment of CERCLA, the court did not discuss violations of specific provisions of the tracking regulations.[125]

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118. *Id.* at 1581.

119. *Id. See supra* notes 12-30 and accompanying text for scope of liability under CERCLA.

120. *Dickerson*, 875 F.2d at 1581. CERCLA liability applies to parties long after their actual contact with the waste. Original generators of the waste, transporters, and past owners of the property are all held liable for CERCLA cleanup costs. 42 U.S.C. § 9607(a) (1982).

121. CERCLA § 107(a) (3) characterizes individuals who arrange for transport of hazardous waste as responsible parties. 42 U.S.C. § 9607(a) (3) (1982).

122. "CERCLA provisions suggest an ongoing safety obligation . . . which would be inconsistent with the Government's argument that it was a discretionary decision for DPDS to transfer all potential liability to its independent contractor . . . ." 875 F.2d at 1581. Regardless of the accuracy of this analysis of CERCLA goals, it does not state a violation of a specific non-discretionary directive.

123. *Id.*

124. EPA regulations require the party contracting for disposal to use a manifest tracking system. 40 C.F.R. §§ 262.20 - 262.23 (1989). The system authorizes a facility to handle the waste, one alternate facility, and a contingency plan for the unavailability of both facilities. 40 C.F.R. § 262.20 (1989). The EPA form, included as part of the document, essentially resembled a shipping document listing generators, transporters, amount and description of the waste, and routing and transportation of the waste. Dickerson, Inc. v. Holloway, 685 F. Supp. 1555 (M.D. Fla. 1987).

125. The district court opinion contained an extensive list of factual findings. 685 F. Supp. at 1557-63. The court outlined the requirements of the manifest system and DPDS' actions and omissions. *Id.* at 1560. Although the DPDS directors of the con-

Third, the *Dickerson* court found the DPDS' internal "cradle-to-grave policy" persuasive.[126] In reaching its conclusion, the court[127] again relied upon *Berkovitz,* which held that a violation of policies directing a specific procedure is not a discretionary act.[128] The *Berkovitz* Court, however, also required that the specific procedure violated must allow no room for policy judgment and decision.[129] In *Dickerson,* the court failed to identify violations of specific directives stemming from DPDS' broad responsibility. If DPDS employee decisions regarding methods to implement the "cradle-to-grave" responsibility involved policy considerations, these decisions could have been discretionary acts.[130]

The district court opinion elucidates the Eleventh Circuit's analysis.[131] The district court based its examination of the discretionary function exception primarily on the planning rather than the operational distinction.[132] If *Varig Airlines*[133] questioned the use of this dis-

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tracts did not follow up on final waste disposal after pickup by AEC, it remains unclear whether this omission specifically violated the regulations. *Id.* The Court of Appeals purported to base its decision on this issue on violation of mandatory regulations. 875 F.2d at 1581. The Court of Appeals, however, did not raise any of the specific facts or possible violations. *Id.* Rather, the court focused on the ongoing responsibility policy behind the manifest document requirement. *Id.*

126. "Cradle to grave" refers to RCRA policy covering hazardous waste from the point of generation to ultimate disposal. *Id.* Generally, "cradle-to-grave" liability makes a responsible party liable from the generation to storage or ultimate disposal. *Id.* RCRA also employs the manifest system to ensure disposal in approved facilities. *See* United States v. Hayes Int'l Corp., 786 F.2d 1499, 1501 (11th Cir. 1986), *cited with approval in Dickerson,* 875 F.2d at 1581.

The Government denied the existence of the internal policy. *Id.* at 1581. However, the lower court found that the policy existed as evidenced by a letter written by one of the project supervisors. *Id. See also Dickerson,* 685 F. Supp. at 1566. The letter recognized that DPDS had an ongoing responsibility to ensure proper disposal and stated that DPDS could potentially face civil liability if the independent contractor disposed of the waste improperly. *Id.*

127. *Dickerson,* 875 F.2d at 1581.

128. Berkovitz v. United States, 486 U.S. 531, 542-43 (1988).

129. *Id.*

130. The *Berkovitz* Court agreed with the *Varig Airlines* statement that an employee at any level can make a discretionary decision. *Berkovitz,* 486 U.S. at 537. Further, the Court in *Varig Airlines* noted that a decision could be made at the planning level which requires discretionary decisions at the operational level. *Varig Airlines,* 467 U.S. at 820.

131. Dickerson, Inc. v. Holloway, 685 F. Supp. 1555 (M.D. Fla. 1987).

132. *Id.* at 1564-65. The court used a test from Alabama Elec. Coop., Inc. v. United States, 769 F.2d 1523 (11th Cir. 1985), based primarily upon a planning/operational distinction. In *Alabama Electric,* the Eleventh Circuit stated that although decisions made at the operational level may include an amount of discretion,

tinction as a test to label government actions as discretionary, *Berkovitz* arguably destroyed it.[134] The district court decision predated *Berkovitz* and all planning versus operational labels ultimately disappeared in the appellate court decision. However, the interpretation of the responsibility policies generated by CERCLA, the EPA, and DPDS as barring any discretionary acts by employees of DPDS strongly recalls a pure planning versus operational distinction.[135]

The second prong of the *Berkovitz* test recognized that even if an act is discretionary, it nevertheless must fall within the scope of action which Congress intended the exception to protect.[136] The policies behind CERCLA and "cradle-to-grave" responsibility lend themselves to the argument that Congress did not intend to protect agency decisions resulting in negligent supervision of hazardous waste disposal.[137]

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they do not require the evaluation of important policy factors and are therefore not protected. 769 F.2d at 1528. The *Alabama Electric* court further stated that if an employee acts based upon a "fixed or readily ascertainable standard" the discretionary function exception does not protect the action. *Id.* at 1529. This standard falls short of the *Berkovitz* mandatory regulation test. The court also distinguished between "important" and "unimportant" policy considerations. 769 F.2d at 1527-28. In addition, the court focused the discretionary function exception on planning decisions by "executives" after purported recognition of the lack of status-bias in the *Dalehite* analysis. *Id.* at 1531 n.3. *Alabama Electric* is inconsistent with post-*Varig Airlines* analysis and is further suspect after *Berkovitz*. *See* Fishback and Killefer, *supra* note 53, at 320-21.

133. The statement in *Varig Airlines* that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies . . . ," seems inconsistent with a purely planning/operational distinction. *Varig Airlines, supra* note 42, at 813. Withholding discretionary decision protection from any decision made at the operational level avoids any analysis of the specific nature of the decision. *See supra* notes 58-66 and accompanying text for a discussion of *Varig Airlines.*

134. The references to Indian Towing Co. v. United States, 350 U.S. 61 (1955), may lead to some confusion regarding the Court's opinion on the planning/operational distinction. The thrust of the whole *Berkovitz* analysis, however, allows for protected discretionary decisions at all stages of the government activity. *See supra* note 54 for discussion of *Indian Towing*. *See also* Fishback and Killefer, *supra* note 53, at 322.

135. For each of these policies, the Eleventh Circuit identified a policy made at the planning level. The court characterized subsequent actions in execution of the policies, or decisions to delegate the responsibility, as non-discretionary. *See Berkovitz*, 486 U.S. at 537. The court did not employ the words "planning" and "operational" in its decision, but the court's logic fits with these labels.

136. *See supra* notes 77-79 and accompanying text.

137. The purpose of the discretionary function exception is to avoid judicial "second-guessing" of policy decisions made by the federal government or its employees. *Varig Airlines*, 467 U.S. at 814. Arguably, given the serious health and safety concerns raised by hazardous waste disposal, Congress and the courts should not allow the government to circumvent duties with which a private person disposing of waste must com-

Rather, the discretionary character of a decision and its protection by the exception represent two different issues. Although the *Dickerson* court concluded that these actions should not be protected by the discretionary function exception,[138] it used the "mandatory requirement" test to find a total lack of discretion.[139]

B. *Independent Contractor Exception*

The decision by DPDS to award disposal contracts to AEC was clearly an action protected by the independent contractor exception.[140] Because AEC was not an employee of the government, its negligence in disposing of the waste oil fell outside the FTCA immunity waiver.[141] Further, the court cannot impute AEC negligence to the government based upon a theory of vicarious or absolute liability.[142] In order to succeed in a FTCA claim, the plaintiff must prove that the government, agency or employee was primarily negligent.[143]

The Eleventh Circuit addressed the independent contractor question in *Emelwon, Inc. v. United States.*[144] In *Emelwon*, the court found governmental liability based upon a nondelegable duty of an employer to ensure that his independent contractor performed inherently dangerous activities in a non-negligent manner.[145] Following the *Emelwon* rationale, the *Dickerson* court carefully stressed that this nondelegable duty differs from an employee's duty in a vicarious liability case where the court imputes the independent contractor's negligence to the government.[146] Rather, the failure of the government employer to fulfill its nondelegable duty served as the basis for the government's negligence.[147]

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ply. However, this raises the counterargument of the courts' refusal to make the government absolutely liable. *See supra* notes 191-92 and accompanying text.

138. Dickerson, Inc. v. United States, 875 F.2d 1577, 1582 (11th Cir. 1989).

139. *Id.* The "mandatory requirement" test refers to the *Berkovitz* analysis of violations of specific mandatory regulations.

140. Dickerson, Inc. v. Holloway, 685 F. Supp. 1555, 1565 (M.D. Fla. 1987).

141. *See supra* notes 36-40 for a discussion of the scope of the FTCA sovereign immunity waiver.

142. *See supra* notes 85-87 and accompanying text.

143. 28 U.S.C. § 1346(b) (1982).

144. 391 F.2d 9 (5th Cir. 1968).

145. *Id.* at 11.

146. 875 F.2d at 1582.

147. *Id.* at 1583.

Emelwon justifies the imposition of a nondelegable duty on the federal government by explaining that under Florida law, the employer is not liable under an absolute liability standard. The employer must take reasonable precautions to ensure that the independent contractor acts in a non-negligent manner.[148] The sole fact, however, that the government cannot delegate this responsibility restricts government discretion to make policy decisions concerning safety.[149] The decision to delegate safety responsibility to the independent contractor can be discretionary.[150] Without a violation of a mandatory provision that the government take specific safety precautions, it is questionable how the Supreme Court would view the *Emelwon* analysis in light of *Berkovitz*.

C. *Applicable State Law*

After overcoming exceptions to the FTCA immunity waiver, the crux of the FTCA claim requires a plaintiff to raise a tort action under

148. 391 F.2d at 11 n.2. The court declined to apply this analysis to a jurisdiction with a different nondelegable duty. *Id.* In State v. Shore Realty Corp., 648 F. Supp. 255 (E.D.N.Y. 1986), the district court addressed the independent contractor exception in a situation very similar to the *Dickerson* case. The *Shore Realty* court found that under New York tort law, the employer maintained a nondelegable duty to ensure that an independent contractor properly carry out inherently dangerous activities. *Id.* at 266. This duty, according to the *Shore Realty* court, creates strict liability for the employer. *Id.* Therefore, the court found the duty to be inapplicable to a government agency. *Id.* The court did recognize that the agency's selection of that particular contractor could be negligent. *Id.* In a footnote, however, the court raised the discretionary function defense to this allegation of negligence. *Id.* at 266 n.9.

149. The government's delegation of safety to independent contractors primarily arises in cases of injury to employees of the independent contractor. The test developed in these cases mirrors the *Berkovitz* test. Absent blatant disregard of a specific safety regulation, the decision to delegate safety responsibility almost always retains protection. *See In re* Agent Orange Prod. Liab. Litig., 818 F.2d 210, 215 (2d Cir. 1987) (barring action by university employees injured in field tests of Agent Orange); *In re* Consol. United States Atmospheric Testing Litig., 820 F.2d 982 (9th Cir. 1987) (upholding government's failure to supervise independent contractor's compliance with safety regulations).

150. Fishback and Killefer, *supra* note 53, at 308. In Scofi v. McKeon, 666 F.2d 170, 172 n.2 (5th Cir. 1982), the court distinguished *Emelwon* from cases where government liability was barred for injury to employees of the contractor. *Id.* The *Scofi* court agreed that danger to third party members of the public, as was the case in *Emelwon*, was not delegable, although the employee's safety could be delegated to the independent contractor. *Id. But see* Lockett v. United States, 714 F. Supp. 848 (E.D. Mich. 1989) (holding the discretionary function exception protects the EPA's decision not to warn residents of chemicals emanating from waste site).

applicable state law.[151] In *Dickerson*, the Eleventh Circuit based liability upon DPDS' negligent failure to take reasonable precautions to ensure the safety of others.[152] Although the negligence arising from the failure to supervise imputes tort liability to a private person,[153] the FTCA limits the applicability of this negligence to the federal government.[154]

In addition to DPDS' negligent failure to take reasonable safety precautions, the *Dickerson* court based its negligence finding on evidence independent of CERCLA or EPA regulation violations.[155] The court thus avoided using the FTCA to permit compensation for violation of federal statutes.[156] The court, however, repeatedly used CERCLA and EPA imposed duties and policies to establish the DPDS as a responsible party for the damage to Dickerson's property.[157] Moreover, the court attacked the government defense of discretionary decision immunity using these same statutory duties and policies.[158] Therefore, the *Dickerson* court acted incongruously by using breaches of statutory duties to avoid the government's defense, and then by refusing to use the same statutory duties to impose liability.[159]

The trend of recent cases ending with *Berkovitz* focused on the nature of the decisions to act or not to act.[160] *Berkovitz* provides the private plaintiff with a framework for an argument which defeats a discretionary function defense. The *Dickerson* court only semantically

151. *See supra* note 37 and accompanying text.

152. Dickerson, Inc. v. United States, 875 F.2d at 1577, 1583 (11th Cir. 1989). The duty arose because DPDS was an employer of an independent contractor engaging in inherently dangerous activity. *Id.* For example, the court found that the DPDS failed to notice incorrect addresses on invoices, and discrepancies in amounts of PCB waste estimated and actually discarded. *Id.*

153. *Id.*

154. Even conceding that a non-delegable duty to protect third parties from harm exists, the execution of this duty could also involve policy considerations. *See supra* notes 55-57 and accompanying text; *see also supra* notes 90-92 for discussion of non-delegable duty and its application to government agencies.

155. 875 F.2d at 1584.

156. *Id. See* Sellfors v. United States, 697 F.2d 1362, 1365 (11th Cir. 1983) (Congress did not intend for the FTCA to redress breaches of federal statutory duties).

157. Dickerson, 875 F.2d at 1581.

158. *See supra* notes 116-130 and accompanying text.

159. Congress intended FTCA action to impose liability based upon state tort law, and deemed it improper to assert a claim based on CERCLA or EPA regulation violations.

160. *See supra* notes 64-65 and accompanying text.

changes *Berkovitz* by deleting its labels but maintaining the same rationale.[161]

Regardless of how egregious a government official's negligence may be, the FTCA does not procure redress if the decisions receive the protection of the discretionary function exception.[162] CERCLA indisputably articulates strong Congressional concern over the problem of hazardous waste.[163] In addition, CERCLA responsibilities and duties clearly apply to government agencies and employees.[164] Congress, however, intended the exception to the FTCA sovereign immunity waiver to prevent a court, through the medium of a private tort action, from usurping the decision of what a government agency or employee should do.[165] When statutes or regulations direct government action and the government fails to comply, *Berkovitz* opens the door to tort action.[166] Despite the emotional and environmental impact of hazardous waste issues, to the extent that the *Dickerson* court allows an FTCA claim to police the implementation of general policy, it oversteps the bounds of the *Berkovitz* decision.

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161. Although the *Dickerson* court articulated the *Berkovitz* analysis, the court drew the line at policy decisions made at the planning level. *Dickerson* did not explore specific deviations from requirements or the possibility of discretionary decisions in execution of the policy. *See supra* notes 131-135 and accompanying text.

162. *See supra* notes 55-57 and accompanying text.

163. *See supra* notes 1-2, 5 and accompanying text.

164. *See supra* note 19 and accompanying text.

165. *Varig Airlines, supra* note 42, at 814. DPDS *could* have done much more to ensure that AEC disposed of the PCB waste properly. DPDS could have followed up on the ultimate disposal of the PCB waste picked up by AEC. Dickerson, Inc. v. Holloway, 685 F. Supp. 1555, 1560 (M.D. Fla. 1987). No DPDS employee assumed the responsibility to check with the designated storage facility, however. *Id.* DPDS also received warnings from sources that the AEC improperly executed disposal. *Id.* DPDS decided that this information came from a disgruntled employee. *Id.* Even if these acts constitute an abuse of discretion, that abuse does not impact on the discretionary exception analysis.

166. *See supra* notes 73-76 and accompanying text for analysis of the *Berkovitz* "mandatory requirement" test.

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